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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

EDDIE RAMIREZ GARCIA,

Defendant and Appellant.

F074392

(Super. Ct. Nos. VCF336018, VCF303585)

# OPINION

**THE COURT**[*]

APPEAL from a judgment of the Superior Court of Tulare County. James W. Hollman, Judge.

Allan E. Junker, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Lewis A. Martinez and Louis M. Vasquez, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Peña, Acting P.J., Smith, J. and Meehan, J.

Defendant Eddie Ramirez Garcia was convicted by no contest plea of possession of methamphetamine for sale and possession of heroin for sale. On appeal, he contends the electronic device search condition of his mandatory supervision is unconstitutionally overbroad. The People argue that the record does not support the conclusion that the condition was imposed. We agree with the People.

In supplemental briefing, defendant contends his two prior drug conviction enhancements must be stricken due to recent legislation. The People concede and we agree.

Defendant also contends by way of supplemental briefing that the penalty assessments attached to the drug program fee (program fee) must be stricken. The People counter that not only must the penalty assessments attached to the program fee remain imposed, the penalty assessments attached to the criminal lab analysis fee (lab fee), recently struck by the trial court, must be reinstated. We agree with the People.

Accordingly, we strike the two prior drug conviction enhancements, reinstate the lab fee penalty assessments, vacate the sentence, and remand for resentencing.

## BACKGROUND

On September 18, 2014, in case No. VCF303585, the trial court sentenced defendant to one year in county jail, followed by two years of mandatory supervision. The court imposed, among other things, a "laboratory analysis fee in the amount of $635 payable as directed by the Probation Officer." According to the probation report, that amount included a $50 lab fee (Health & Saf. Code, § 11372.5)[1] and a $100 program fee (§ 11372.7), plus various penalty assessments attached to those fees.

On June 24, 2016, at the change of plea hearing, defense counsel stated that the indicated sentence was a total of eight years, split into three years in jail, followed by

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[1] All statutory references are to the Health and Safety Code unless otherwise noted.

five years of mandatory supervision. Thereafter, in case No. VCF336018, defendant pled no contest to possession of methamphetamine for sale (§ 11378; count 1) and possession of heroin for sale (§ 11351; count 2). He admitted allegations that he had suffered two prior drug convictions within the meaning of section 11370.2, subdivision (c). He also admitted violating the mandatory supervision imposed on September 18, 2014, in case No. VCF303585.

On July 21, 2016, the trial court stated it was prepared to impose the previously indicated sentence, which it did, as follows. In case No. VCF336018, the court imposed 16 months on count 1, a consecutive eight-month term on count 2, plus two consecutive three-year terms for the prior drug conviction enhancements, for a total term of eight years. The court split the term into three years in jail, followed by five years of mandatory supervision.[2] Additionally, the court ordered defendant to pay "the $1310 drug fees as articulated in the probation report." According to the probation report, that amount included a $100 lab fee (§ 11372.5) and a $200 program fee (§ 11372.7), plus various penalty assessments associated with those fees. The report also recommended the following as one of the conditions of mandatory supervision: "The defendant submit to a search of his person, residence, automobile and any object under his control, including any electronic device, at any time day or night, with or without a search warrant, with or without his consent, by any Peace Officer or Probation Officer."

At the same hearing, in case No. VCF303585, the trial court revoked mandatory supervision and sentenced defendant to three years in county jail, to run concurrently to

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[2] We note that the August 4, 2016 abstract of judgment contains two serious errors. It incorrectly reflects the term on count 2 as concurrent and the total term as six years eight months (even noting a one year eight month jail term, followed by five years of mandatory supervision). The errors are echoed by the minute order. In their briefs, the parties both correctly state the sentence as imposed, but neither mentions the errors in the abstract.

the term in case No. VCF336018. The court ordered that all previously imposed fines and fees remain in full force and effect.

On September 14, 2016, defendant filed a notice of appeal in case No. VCF336018, which we later construed to include case No. VCF303585.

On November 16, 2016, defendant sent the trial court a letter requesting that the court delete the penalty assessments associated with the lab fee (§ 11372.5) in case No. VCF336018 based on *People v. Watts* (2016) 2 Cal.App.5th 223 (*Watts*). The trial court agreed and ordered the abstract amended.

On February 8, 2017, defendant sent the trial court a similar letter regarding the penalty assessments associated with the lab fee (§ 11372.5) in case No. VCF303585. The trial court agreed and ordered the abstract amended.

## DISCUSSION

### I. Electronic Device Search Condition

When orally imposing mandatory supervision in case No. VCF336018, the trial court stated: "[Defendant] is to submit to a search of his person, residence, and automobile at any time by any peace officer, probation officer." The minute order reflects the court's oral order that defendant submit to a search of his person, automobile, and residence without a search warrant. The probation officer's report, however, recommended an electronic device search condition.

Although the traditional rule was that a court's oral pronouncement of probation conditions controlled over the written version, "the modern rule is that if the clerk's and reporter's transcripts cannot be reconciled, the part of the record that will prevail is the one that should be given greater credence in the circumstances of the case." (*People v. Pirali* (2013) 217 Cal.App.4th 1341, 1346.) Here, the oral pronouncement and the minute order are in accord; only the probation officer's recommendation differs. Although the judge signed the probation officer's report, the signature merely

acknowledged the judge had "read and considered the Report and Recommendation of the Probation Officer on File."

We conclude the oral pronouncement—which is very detailed and echoed by the clerk's minute order—controls, and thus the court did not make the electronic device search a condition of defendant's mandatory supervision.

## II. Prior Drug Conviction Enhancements

As noted, the trial court imposed two sentence enhancements under section 11370.2, subdivision (c) because defendant admitted having suffered two qualifying prior convictions.

Section 11370.2, however, was recently amended by Senate Bill No. 180 (2017-2018 Reg. Sess.), which became effective on January 1, 2018. The bill narrows the scope of section 11370.2 to apply only to prior convictions for narcotics sales involving a minor in violation of section 11380. Defendant's prior drug convictions were for two possession for sale violations (§§ 11378, 11351).

Absent some indication to the contrary in the bill, courts presume that the Legislature intended amendments to the Penal Code that reduce the punishment for a crime to apply retroactively, at least in cases that are not yet final. (See *People v. Brown* (2012) 54 Cal.4th 314, 323-324; see also *In re Estrada* (1965) 63 Cal.2d 740.) We conclude the same applies here. Nothing in Senate Bill No. 180 indicates the Legislature intended prospective application only. (Stats. 2017, ch. 677, § 1.) The People concede.

Accordingly, the two prior drug conviction enhancements must be stricken.

## III. Program Fee and Lab Fee Penalty Assessments

Defendant contends we should vacate the penalty assessments attached to the program fee (§ 11372.7) because the program and lab fees are not fines, penalties, or forfeitures, and thus they do not trigger any penalty assessments. Defendant relies on *People v. Webb* (2017) 13 Cal.App.5th 486 (penalty assessments not applicable to

program fee) and the analogous case of *Watts*, *supra*, 2 Cal.App.5th 223 (penalty assessments not applicable to lab fee). The People respond that the penalty assessments attached to both fees were proper and mandatory, and that the penalty assessments attached to the lab fee must be reinstated. We agree.

Penalty assessments apply to any "fine, penalty, or forfeiture imposed and collected by the courts for all criminal offenses" and increase such fines, penalties, or forfeitures by a specified amount. (E.g., Pen. Code, § 1464, subd. (a)(1); Gov. Code, § 76000, subd. (a)(1).) In *People v. Sierra* (1995) 37 Cal.App.4th 1690 at page 1696 (*Sierra*), we concluded that the program fee (§ 11372.7) is a fine or penalty to which penalty assessments are applicable.

In *People v. Martinez* (1998) 65 Cal.App.4th 1511, the court applied our reasoning to the lab fee specified in section 11372.5: "Under the reasoning of *Sierra*[, *supra,* 37 Cal.App.4th 1690], we conclude … section 11372.5, defines the [lab] fee as an increase to the total fine and therefore is subject to penalty assessments under [Penal Code] section 1464 and Government Code section 76000." (*People v. Martinez*, *supra,* at p. 1522; see *People v. Sharret* (2011) 191 Cal.App.4th 859, 869-870 [because lab fee was punitive in nature, court was required to stay its imposition under Pen. Code, § 654]; *People v. Terrell* (1999) 69 Cal.App.4th 1246, 1257 [court required to impose state and county penalty assessments on lab fee]; *People v. Sanchez* (1998) 64 Cal.App.4th 1329, 1332 [abstract of judgment had to be amended to include lab fee imposed because it was "an increment of a fine"]; see also *People v. Talibdeen* (2002) 27 Cal.4th 1151, 1157 [dictum noting that the trial court "had no choice and had to impose" penalties upon the lab fee].)

Some courts, however, have held to the contrary. *Watts*, which itself noted that its holding was "contrary to the weight of authority," held that the lab fee "is not subject to penalty assessments." (*Watts, supra,* 2 Cal.App.5th at p. 226; see *People v. Vega* (2005)

130 Cal.App.4th 183, 193-195 [lab fee is not punishment for purposes of Pen. Code, § 182, subd. (a)].)

We decline to reconsider *Sierra*. Furthermore, we agree that the lab fee, like the program fee, is a fine or penalty that is subject to penalty assessments. Accordingly, in defendant's case, the penalty assessments on both the program fee and the lab fee were properly imposed in both cases.

## DISPOSITION

The two three-year prior drug conviction enhancements pursuant to Health and Safety Code section 1170.2, subdivision (c) imposed in case No. VCF336018 are stricken. The penalty assessments associated with the lab fee (Health & Saf. Code, § 11372.5), previously stricken by the trial court in cases No. VCF336018 and VCF303585, are reinstated in both cases. The sentence is vacated and the matter remanded to the trial court for resentencing with directions to include these modifications (and to be aware that the August 4, 2016 abstract of judgment contains two errors regarding the current sentence in case No. VCF336018—a concurrent rather than consecutive term on count 2 and a total term of six years eight months rather than eight years). In all other respects, the judgment is affirmed.